

1990

Richard H. Nielsen v. Mark O'Reilly, Linda R.
French and Metropolitan Property and Liability
Insurance Co. : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Glenn C. Hanni; Strong & Hanni; attorneys for respondent.

L. Rich Humpherys, Karra J. Porter; Christensen, Jensen & Powell; attorneys for appellant.

Recommended Citation

Reply Brief, *Nielsen v. O'Reilly*, No. 900489.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/3250

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT

STATE OF UTAH

RICHARD H. NIELSEN,)	
)	
Plaintiff/Appellant,)	
)	Case No. 900489
v.)	
)	Priority No. 16
MARK O'REILLY, LINDA R. FRENCH)	
and METROPOLITAN PROPERTY &)	
LIABILITY INSURANCE CO.,)	
)	
Defendants/Respondents.)	

**OBJECTION AND REPLY
IN SUPPORT OF PETITION FOR REHEARING**

APPEAL FROM A SUMMARY JUDGMENT ENTERED
IN THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY
HONORABLE HOMER F. WILKINSON

L. Rich Humpherys, 1582
Karra J. Porter, 5223
CHRISTENSEN, JENSEN & POWELL, P.C.
175 South West Temple, Suite 510
Salt Lake City, Utah 84101
Attorneys for Plaintiff/Appellant

Glenn C. Hanni
STRONG & HANNI
6th Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendant/Respondent
Metropolitan Property & Liability Insurance Company

TABLE OF CONTENTS

INTRODUCTION AND OBJECTION	1
ARGUMENT	1
POINT I	
THE RELATED CASE CITED BY RESPONDENTS DID NOT AFFECT THE PRE-JUDGMENT ISSUE IN THIS CASE.	1
POINT II	
NIELSEN'S BREACH OF CONTRACT CLAIM WAS ADEQUATELY STATED AND WAS EXPRESSLY RESERVED AT TRIAL.	6
POINT III	
IT IS APPROPRIATE FOR THIS COURT TO REHEAR NIELSEN'S ARGUMENT THAT INTEREST IS AVAILABLE FOR FAILURE TO PAY THE CONTRACT AMOUNT TIMELY AND TO CONSIDER EVIDENCE OF LEGISLATIVE DIRECTIVE.	7
CONCLUSION	10

TABLE OF AUTHORITIES

U.R.A.P. 35	7
Utah Code Ann. § 31-41-8 [now 31A-22-309(5)]	9
Utah Code Ann. § 31A-26-301(1)	9

INTRODUCTION AND OBJECTION

Plaintiff/appellant (hereinafter "Nielsen") filed a petition for rehearing November 27, 1992. Upon review, the Court requested defendants/respondents (hereinafter "Metropolitan") to file an answer to the petition, which answer was filed on February 22, 1993. In its reply, Metropolitan presented arguments and evidence which had never been raised either in the district court or before this Court. Additionally, Metropolitan stated in its response that the Petition was frivolous, and asked for attorney fees. Nielsen objects to Metropolitan's raising a completely new issue and to Metropolitan's misrepresentations regarding that issue. Nielsen also addresses Metropolitan's request for sanctions. Accordingly, Nielsen submits the following response to Metropolitan's Answer to Petition for Rehearing.

ARGUMENT

POINT I

THE RELATED CASE CITED BY RESPONDENTS DID NOT AFFECT THE PRE-JUDGMENT ISSUE IN THIS CASE.

Metropolitan's first point is that "this court did not overlook or misapprehend any issues or facts in reaching its decision." In spite of that statement, however, Metropolitan cites to and attaches documents from a related lawsuit never previously discussed in connection with this case either in the court below or

in this Court, to which documents Nielsen objects and moves to strike the same.

Metropolitan's primary argument is a claim that Nielsen filed and received a settlement in another action, Richard H. Nielsen v. Metropolitan Property & Liability Insurance Co., Civil No. C91-1658 ("Related Case"), which encompassed the pre-judgment interest claimed for Metropolitan's alleged breach of contract in this case.

Metropolitan then argues that in light of the Related Case, Nielsen "filed a frivolous petition for rehearing." In asserting that argument, Metropolitan misstates the actual circumstances of the other litigation, the settlement and the release executed in that case. In citing a portion of one sentence in the Release of All Claims, Metropolitan conveniently fails to note the express language in the Release which recognized and preserved the separate and distinct claims pending in the instant case:

Notwithstanding the provisions of this release, the undersigned expressly reserves all claims against Metropolitan Property & Liability Insurance Company now pending before the Utah Supreme Court in the case of Richard H. Nielsen v. Mark O'Reilly, Linda R. French and Metropolitan Property & Liability Insurance Co., Case number 900489.

(Exhibit G to Respondents' Answer to Petition for Rehearing, p. 2).

As evidenced by the briefs, which had already been filed and argued at the time of the Release, Nielsen's entitlement to pre-judgment interest on the contract was undisputedly one of the issues "pending before the Utah Supreme Court" in the instant case.

The plain wording of the Release itself thus established the inappropriateness of Metropolitan's current claim that the pre-judgment interest issue was resolved in the related case. In fact, in correspondence between the parties' counsel, the release's reservation of all claims pending before this Court was expressly insisted upon by Nielsen's counsel and agreed to by Metropolitan's counsel. Nielsen would not have settled the related case without the reservation of claims. (*Affidavit of Humpherys, Exhibit A*).

Metropolitan similarly fails to mention the fact, expressly recognized by Judge Murphy, that the claims in this case and the related case were not the same. In fact, Metropolitan it filed a motion for summary judgment in the related case, making essentially the same argument and arguing that *res judicata* barred the claims in the related case. (*Exhibit C to Respondent's Answer to Petition for Rehearing, Memorandum in Support of Defendant's Motion for Summary Judgment*). Nielsen's response to that motion, however, pointed out consistently and repeatedly that the contractual liability alleged in the instant case is separate and distinct from the extra-contractual liability asserted in the related case. (*Exhibit D to Respondents' Answer to Petition for Rehearing, Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment*).

Judge Murphy recognized the distinction, and held that plaintiff's claims in the related case were not the same as that

asserted in the instant case, and that *res judicata* did not apply. (*Exhibit E to Respondents' Answer to Petition for Rehearing, Memorandum Decision and Order*).

Metropolitan further fails to recognize the fact that, in the related case, plaintiffs did not assert a claim for breach of the express terms of the contract. Instead, Nielsen's claims were for breach of the implied covenant of good faith and fair dealing, misrepresentation, warranty, and intentional infliction of emotional distress, based upon allegations of improper motivation and unlawful conduct, such as bad faith, malice, and false warranties and representations. (*Exhibit B to Respondents' Answer to Petition for Rehearing*).

By contrast, in this case Nielsen is seeking pre-judgment interest solely in connection with Metropolitan's liability under the express terms of the contract. As noted in Nielsen's briefs on the merits, such pre-judgment interest is not conditioned upon, or otherwise tied to, unlawful conduct by an insurer. Instead, Metropolitan's breach of contract in itself entitled plaintiff to pre-judgment interest on the amount due under the contract. In the related case, Nielsen would have prevailed only if he could establish unlawful conduct, particularly bad faith, misrepresentation, or intentional infliction. Such unlawful conduct is irrelevant to the issue of pre-judgment interest in the present case.

In rejecting Metropolitan's *res judicata* argument in the related case, Judge Murphy noted that "[d]efendant's motion requires the Court to compare the claim in the first case with the claim in the instant case." After thorough analysis, Judge Murphy concluded that, "[w]hile the facts pertinent to each case do overlap somewhat, there is a sufficient distinction that plaintiff is not precluded by the first case from pursuing the claims in the instant case." (*Exhibit E to Respondents' Answer to Petition for Rehearing, Memorandum Decision and Order*).

Metropolitan necessarily recognized the distinct nature of the claims in the two cases when it permitted Nielsen to condition settlement of the related case upon preservation of all claims then pending in the appeal before this Court. In fact, Metropolitan recognizes elsewhere in its answer to the petition for rehearing that "Nielsen's claim against Metropolitan in this case was not a bad faith action." (*Answer to Petition for Rehearing*, p. 9). For Metropolitan to claim now that the related case resolved the pre-judgment interest issue -- in spite of the express language of the release and Judge Murphy's ruling -- is highly inappropriate in light of the undisputable circumstances of both cases.¹

¹ It is even more questionable for Metropolitan to compound its inappropriate conduct by stating that "Nielsen should voluntarily withdraw his petition for rehearing, apologize to this Court for having filed a frivolous petition for rehearing, and volunteer to pay Metropolitan's costs and attorneys' fees incurred by having to respond to the rehearing petition," and that "this

POINT II

NIELSEN'S BREACH OF CONTRACT CLAIM WAS ADEQUATELY STATED AND WAS EXPRESSLY RESERVED AT TRIAL.

Metropolitan also contends that Nielsen's complaint should not be read to encompass a breach of contract claim. With respect to this argument, petitioner noted in its initial brief that, under the language of the complaint and well-established principles of notice pleading, Nielsen did state a claim for breach of contract below. Nielsen also pointed to Metropolitan's own repeated recognition of Nielsen's claim as based in contract. Those points will not be repeated here. In disputing these assertions, however, Metropolitan apparently suggests that the allegations should not be read that way because Metropolitan did not completely refuse payment, but only disputed the amount of payment owing. This distinction appears to overlook the fact that a breach of contract may -- and frequently does -- arise not simply from refusal to pay, but from payment of an amount less than the actual amount owing.

Nielsen does not quite comprehend Metropolitan's additional assertion that the claim was not presented to the jury. As Metropolitan is aware, its contract liability was expressly

Court should mandate that such action take place." Even if Metropolitan's current position were the result of lack of knowledge by Metropolitan's present counsel (see Affidavit of L. Rich Humpherys, attached hereto as Exhibit A), rather than intentional misstatement, it is improper to make such an objectionable statement without sufficient information.

reserved by the parties and was not to be presented to the jury. (R. 553, pp. 1-17). It is obviously unfair for Metropolitan to agree to keep the issue of contract liability from the jury, then argue that the issue should not be addressed because it was not presented to the jury.

POINT III

**IT IS APPROPRIATE FOR THIS COURT TO REHEAR
NIELSEN'S ARGUMENT THAT INTEREST IS AVAILABLE
FOR FAILURE TO PAY THE CONTRACT AMOUNT TIMELY
AND TO CONSIDER EVIDENCE OF LEGISLATIVE
DIRECTIVE.**

Nielsen also asks this Court to address his argument that, even if the action against Metropolitan were not grounded in contract, he would be entitled to pre-judgment interest if Metropolitan knew or should have known that it would have to pay policy limits to Nielsen, and failed to do so promptly. Metropolitan first suggests that this argument may not be raised in the petition for rehearing because it was already briefed by the parties for the Court. In arguing that such an assertion is not proper grounds for a petition for a rehearing, Metropolitan fails to note the grounds set forth in U.R.A.P. 35, which allows rehearing if the reviewing court has overlooked a particular argument. Respondents do not cite to any portion of the opinion in which the argument was addressed, but simply note that the argument was briefed for the Court. It is precisely this type of situation which is contemplated by Rule 35.

Respondents next argue that there is nothing in the record to support the factual assertion that Metropolitan knew or should have known that it was obligated to pay policy limits to Nielsen, and that it was not presented to the jury. Again, Metropolitan fails to mention the fact that the issues of Metropolitan's contract liability, including pre-judgment interest, were expressly reserved by the parties and was not to be presented at trial. Moreover, Metropolitan moved to exclude the policy from evidence and any reference to policy limits. This motion was granted by the trial court. It wasn't until the parties had rested, just before closing statements, that Metropolitan changed its position and asked the court to accept the policy as an exhibit. (R. 553, pp. 1-17).

Following the trial, Nielsen presented his argument on contract liability to the trial court. Among the arguments specifically raised by Nielsen was that Metropolitan would be liable for pre-judgment interest on the amount due under its contract if Metropolitan knew or should have known that it should have paid that amount earlier, and failed to do so. Although the very circumstances of the case, including a verdict nearly three times Metropolitan's policy limits, pointed strongly to Metropolitan's breach, at the very least a factual issue was presented which the trial court should not have resolved by granting summary judgment. The circumstances illustrating this

factual issue were set forth by Nielsen in his substantive briefs and petition for rehearing.

Metropolitan next points to this Court's citation to two cases from other jurisdictions "for the proposition that an insurer is not liable for pre-judgment interest in excess of its policy limits." As is plain from the opinion, however, the Court's citation of the cases was in connection with Nielsen's argument based upon the definition of "damages" in the policy. (*Exhibit A, Opinion, p 10*). Recognizing this Court's contrary ruling on that issue, Nielsen has not raised the issue in the Petition for Rehearing. However, the Court did not appear to address Nielsen's argument concerning timeliness of payment. It is that issue of which Nielsen seeks rehearing.

Finally, Metropolitan disagrees with Nielsen's assertion that the legislature has provided direction indicating a public policy of requiring payment of pre-judgment interest on overdue insurance payments. The relevant Insurance Code provisions are set forth in the Petition, and will not be set forth again here. Utah Code Ann. §§ 31A-26-301(1); 31-41-8 [now 31A-22-309(5)]. While Metropolitan characterizes Section 31A-26-301(1) as "random statutory language" (and does not address Section 31-41-8), it would seem difficult to find a provision more indicative of legislative directive. The section applies to all insurance claims, and expressly indicates that "reasonable interest rates" are to be charged on late

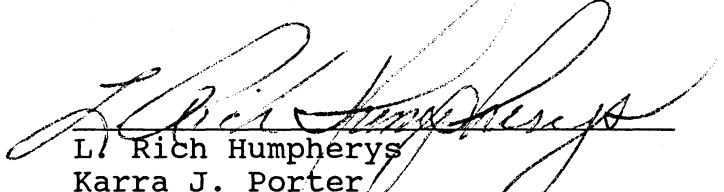
payments. Indeed, it is clear that the legislature assumes such interest is available. As discussed further in the Petition, this section provides the "legislative directive" sought by this Court, demonstrating the legislature's intent to require insurers to pay interest in addition to the "late payments" themselves. This position is consistent with the fact that pre-judgment interest is available in virtually all other contract claims, and is in addition to the amount due under the contract itself.

CONCLUSION

For the reasons set forth above, and in the Petition for Rehearing, Nielsen requests the Court to grant the petition.

DATED this 7th day of March, 1993.

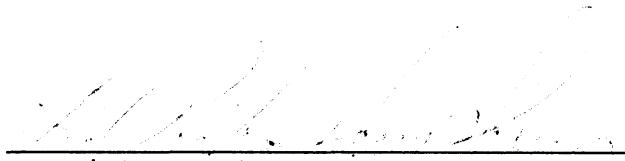
CHRISTENSEN, JENSEN & POWELL, P.C.


L. Rich Humpherys
Karra J. Porter
Attorneys for Plaintiff/Petitioner

CERTIFICATE OF SERVICE

This is to certify that on the 8th day of March, 1993, four
(4) true and correct copies of the foregoing **OBJECTION AND REPLY IN
SUPPORT OF PETITION FOR REHEARING** were mailed, first-class postage
prepaid, to:

Glenn C. Hanni
STRONG & HANNI
6th Floor Boston Building
Salt Lake City, Utah 84111



L. Rich Humpherys
Karra J. Porter
Attorneys for Plaintiff/Petitioner

EXHIBIT A

STATE OF UTAH

)
)
)
)
)
)
)
)
)
)
)

Priority No. 16

Glenn C. Hanni
STRONG & HANNI
6th Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendant/Respondent
Metropolitan Property & Liability Insurance Company

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

L. Rich Humpherys, being first duly sworn, deposes and says:

1. I am licensed to practice law in the State of Utah and represent Richard H. Nielsen herein. I also represented Richard H. Nielsen in a case against Metropolitan Property & Liability Insurance Company, civil number 910901658PI, before Judge Michael R. Murphy, Third Judicial District Court of Salt Lake County, State of Utah (hereinafter referred to as the "Bad Faith Action").

2. A complaint in the Bad Faith Action was filed on or about March 15, 1991, wherein Richard H. Nielsen claimed causes of action for breach of the implied covenant of good faith and fair dealing, misrepresentation, warranty, and intentional infliction of emotional distress. Metropolitan moved to dismiss Nielsen's complaint upon the grounds that the present action would preclude the Bad Faith Action based upon res judicata. This motion was extensively briefed and argued. On December 11, 1991, Judge Murphy entered a six page memorandum decision denying Metropolitan's motion, finding that the causes of action and claims in the Bad Faith Action were separate from the present action.

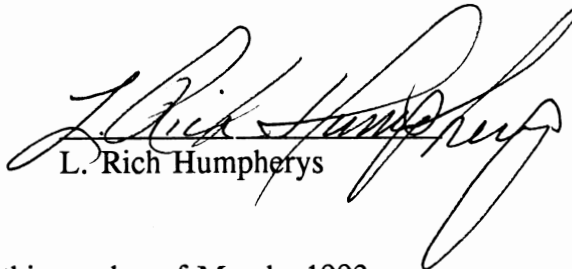
3. On or about March 4, 1992, the parties reached a settlement of the "Bad Faith Action," which settlement expressly reserved all claims that Richard Nielsen had against Metropolitan that were pending before the Utah Supreme Court in the present action. See page 2 of the Release attached hereto as Exhibit 1.

4. The negotiations leading to the settlement of the "Bad Faith Action" were between myself and Barbara L. Maw, an attorney who at the time was working for Strong & Hanni. The reservation referred to in the above paragraph was expressly bargained for and included all claims against Metropolitan, including prejudgment interest, that were raised in the present appeal. Nielsen would not have settled the "Bad Faith Action" upon the same terms without said reservation provision. On March 3, 1992, Barbara Maw sent me a general release which did not contain said reservation. On March 4, 1992, I discussed with Barbara Maw the fact that her release did not contain the reservation. She asked me to draft the reservation and submit it to her for approval. I did this by a facsimile transmittal and correspondence. See Exhibit 2 attached hereto. She contacted me shortly thereafter on the same day and approved the proposed reservation provision and Richard Nielsen signed the same. I returned the Release with correspondence that confirmed her approval. See Exhibit 3 attached hereto.

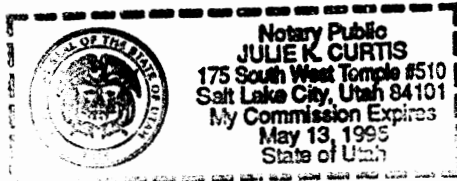
5. The Order of Dismissal signed by Judge Murphy contained the qualifying words, "Based on the terms of the Release of All Claims signed by plaintiff on March 4, 1992..." See Exhibit 4 attached hereto.

6. In the course of the negotiations and settlement of the "Bad Faith Action" I had no dealings or communications with Robert Janicki, who I understand was the principal drafter of the respondent's current brief opposing the petition for rehearing, nor with Glenn Hanni.

DATED this 8th day of March, 1993.


L. Rich Humpherys

Subscribed and sworn to before me this ___ day of March, 1993.



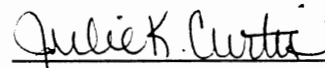

Notary Public

EXHIBIT 1

RELEASE OF ALL CLAIMS

For and in consideration of the payment to the undersigned of the total sum of ONE HUNDRED EIGHTY THOUSAND DOLLARS (\$180,000), including costs accrued, the receipt of which is hereby acknowledged, the undersigned, RICHARD NIELSEN, hereby forever releases and discharges METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY, and any and all other persons, firms, and corporations, from and of any and all claims, demands, benefits, either past or future, causes of action both for property damage and bodily injury, damages, costs, losses, expenses or compensation, or any claims of any kind on account of or in any way arising out of or associated with the claims handling, adjustment, and settlement of a loss which occurred and arose out of an incident on or about April 28, 1983, including but limited to any claims for breach of contract breach of implied covenant of good faith and fair dealing, misrepresentation, warranty, and intentional infliction of emotional distress.

The undersigned hereby declares and represents that the injuries sustained by the undersigned are or may be permanent and progressive and that recovery therefrom may be uncertain and indefinite and in making this release and agreement, it is understood and agreed that the undersigned relies wholly upon his own judgment, belief and knowledge of the nature, extent and duration of said injuries and in granting this complete release, he does not rely upon anything told to him or represented to him by the persons, firms, or corporations who are being released, or by any person or persons representing him.

Particularly, the undersigned releases the persons and companies referred to above from and of all causes of action, claims, demands, costs, expenses or compensation as set forth in that certain complaint on file in the Third Judicial District Court of Salt Lake County, State of Utah, wherein Richard Nielsen is plaintiff and Metropolitan Property & Liability Insurance Company is defendant, Civil No. 910901658PI.

The undersigned further understands and agrees that this settlement is a compromise of a doubtful and disputed claim and that payment is not to be construed as an admission of liability on the part of any of the persons or companies referred to above and who are released herein and by whom liability is expressly denied.

The undersigned authorizes and consents to stipulate to a dismissal with prejudice on the merits of that certain action pending in the Third Judicial District Court of Salt Lake County, State of Utah, which is referred to above.

Notwithstanding the provisions of this release, the undersigned expressly reserves all claims against Metropolitan Property & Liability Insurance Company now pending before the Utah Supreme Court in the case of Richard H. Nielsen v. Mark O'Reilly, Linda R. French and Metropolitan Property & Liability Insurance Co., Case number 900489.

The undersigned further acknowledges and accepts the advice of counsel in the settlement of this matter and that this is a fully, complete and final release of the above-named parties for any matter or thing done or omitted to be done by said parties, and as a result of the incident referred to above.

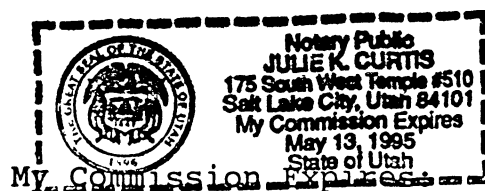
I further state that I have carefully read the foregoing release of all claims, know the contents thereof, and that I sign the same as my own free act, and it is my intention to be legally bound thereby.

DATED this 4TH day of March, 1992.


Richard Nielsen

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

On this 4th day of March, 1992, before me personally appeared RICHARD NIELSEN, known to me (or satisfactorily proven) to be the person who executed the foregoing document.



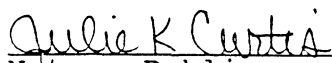

Notary Public
Residing at SLC, UT

EXHIBIT 2



Christensen, Jensen & Powell, P.C.
175 South West Temple, Suite 510
Salt Lake City, Utah 84101

FACSIMILE TRANSMITTAL FORM

FACSIMILE #801-355-3472

Please deliver the following page(s) to: Barbara Maw

STRONG & HANNT

FACSIMILE NUMBER: 596-1508

TOTAL NUMBER OF PAGES (Including cover page): 3

DATE: March 4, 1992

FROM: L. Rich Humpherys

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE TO:

(801) 355-3431 Julie

Re: _____

Message: _____

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL(S) OR ENTITY FOR WHICH IT IS ADDRESSED, AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU RECEIVE THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

LAW OFFICES OF
CHRISTENSEN, JENSEN & POWELL

A PROFESSIONAL CORPORATION
175 SOUTH WEST TEMPLE, SUITE 510
SALT LAKE CITY, UTAH 84101

TELEPHONE (801) 355-3431

FAX (801) 355-3472

E. R. CHRISTENSEN
(1886-1979)

*ALSO LICENSED IN WASH., D.C. AND COLORADO
**ALSO LICENSED IN CALIFORNIA
*ALSO LICENSED IN ARIZONA
**ALSO LICENSED IN WASHINGTON STATE
***ALSO LICENSED IN TEXAS

RAY R. CHRISTENSEN
JAY E. JENSEN
ELWOOD P. POWELL*
RICHARD L. EVANS**
ROGER P. CHRISTENSEN
DALE J. LAMBERT
L. RICH HUMPHERYS
TODD S. WINEGART
DENTON M. HATCH
WILLIAM J. HANSEN
M. DOUGLAS BAYLY
PHILLIP S. FERGUSON
ROGER R. FAIRBANKS
ROBERT K. HILDER
GAINER M. WALDBILLIG
CRAIG V. WENTZ††
LEE C. HENNING
WESLEY M. LANG
KELLY H. MACFARLANE
KARRA J. PORTER†††
MARK L. ANDERSON
RUSSELL G. WORKMAN
STEPHEN R. HADFIELD
DAVID C. RICHARDS

March 4, 1992

VIA FAX

Barbara Maw
Strong & Hanni
6th Floor Boston Building
Salt Lake City, UT 84111

Re: Nielsen v. Metropolitan

Dear Barbara:

Pursuant to our discussion, I am faxing you the second page of the release with the additional paragraph regarding the reservation of all claims pending before the Utah Supreme Court in the first action. I also changed the date. Otherwise the release is unchanged.

Upon your approval, I will have the same executed by Richard Nielsen.

Very truly,

CHRISTENSEN, JENSEN & POWELL



L. Rich Humpherys

LRH/jkc
Enclosure

Inwithstanding the provisions of the release the undersigned expressly reserves all claims ^{against Metropolitan Fire & Liability Ins Co} now pending before the Utah Supreme Court in the case of Nielsen v. Metropolitan, ^{5 Public, Fire, and} ~~case~~ case no. 900489.

The undersigned further acknowledges and accepts the advise of counsel in the settlement of this matter and that this is a full, complete and final release of the above-named parties for any matter or thing done or omitted to be done by said parties, and as a result of the incident referred to above.

I further state that I have carefully read the foregoing release of all claims, know the contents thereof, and that I sign the same as my own free act, and it is my intention to be legally bound thereby.

DATED this _____ day of February, 1992.

RICHARD NIELSEN

STATE OF UTAH)
) ss.
County of Salt Lake)

On this _____ day of February, 1992, before me personally appeared RICHARD NIELSEN, known to me (or satisfactorily proven) to be the person who executed the foregoing document.

Notary Public
Residing at _____

My Commission Expires:

EXHIBIT 3

LAW OFFICES OF
CHRISTENSEN, JENSEN & POWELL

A PROFESSIONAL CORPORATION
175 SOUTH WEST TEMPLE, SUITE 510
SALT LAKE CITY, UTAH 84101

TELEPHONE (801) 355-3431

FAX (801) 355-3472

E. R. CHRISTENSEN
(1886-1979)

*ALSO LICENSED IN WASH., D.C. AND COLORADO
**ALSO LICENSED IN CALIFORNIA
+ALSO LICENSED IN ARIZONA
++ALSO LICENSED IN WASHINGTON STATE
+++ALSO LICENSED IN TEXAS

RAY R. CHRISTENSEN
JAY E. JENSEN
ELWOOD P. POWELL*
RICHARD L. EVANS**
ROGER P. CHRISTENSEN
DALE J. LAMBERT
L. RICH HUMPHERYS
TODD S. WINEGAR†
DENTON M. HATCH
WILLIAM J. HANSEN
M. DOUGLAS BAYLY
PHILLIP S. FERGUSON
ROGER R. FAIRBANKS
ROBERT K. HILDER
GAINER M. WALDBILLIG
CRAIG V. WENTZ††
LEE C. HENNING
WESLEY M. LANG
KELLY H. MACFARLANE
KARRA J. PORTER†††
MARK L. ANDERSON
RUSSELL G. WORKMAN
STEPHEN R. HADFIELD
DAVID C. RICHARDS

March 5, 1992

HAND DELIVERED

Barbara Maw
Strong & Hanni
6th Floor Boston Building
Salt Lake City, UT 84111

Re: Nielsen v. Metropolitan

Dear Barbara:

I enclose the executed release and stipulation as modified and approved by you. The changes were made to clarify that all claims of Richard Nielsen on appeal in the prior case, are reserved.

As always, we appreciate your professional demeanor.

Very truly,

CHRISTENSEN, JENSEN & POWELL

L. Rich Humpherys

LRH/jkc
Enclosure

EXHIBIT 4

FILED DISTRICT COURT
Third Judicial District

MAR 18 1992

SALT LAKE COUNTY

Deputy Clerk

Glenn C. Hanni #A1327
Barbara L. Maw #4081
STRONG & HANNI
Attorneys for Defendant
Metropolitan Ins. Co.
600 Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

RICHARD H. NIELSEN,)	
)	ORDER OF DISMISSAL
Plaintiff,)	
v.)	
)	
METROPOLITAN PROPERTY &)	
LIABILITY INSURANCE CO.,)	Civil No. 910901658PI
)	Judge Michael R. Murphy
Defendants.)	

Based on the terms of the Release of All Claims signed by plaintiff on March 4, 1992, the stipulation signed by counsel and the motion of the above parties, through their respective counsel, and good cause therefore appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the above-entitled action be and is dismissed with prejudice and on the merits, with the parties to bear their own respective costs.

BY THE COURT: 3/18/92

By: S/
Honorable Michael Murphy
District Judge